IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR PENSION BENEFIT GUARANTY CORPORATION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 592 F.2d 947. It is reproduced in the Appendix to the Petition and will be referred to herein as "Pet. App.". The opinion of the District Court is reported at 436 F. Supp. 1334.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. A defined benefit pension plan is terminated after the September 2, 1974 effective date of the guaranty provisions of ERISA,[1] 29 U.S.C. § 1322, but before the January 1, 1976 effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. PBGC guarantees such benefits, subject to limitations not relevant here. The assets of the trust are insufficient to fund the level of benefits guaranteed by PBGC. PBGC finds the benefits "nonforfeitable" within 29 U.S.C. § 1322, thereby triggering statutory liability against the employer under 29 U.S.C. § 1362.

In such a termination, does the plan's disclaimer, purporting to limit satisfaction of vested benefit rights to the assets in the fund, render the participants' rights not "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to PBGC guaranty?

2. If Nachman is liable to PBGC under 29 U.S.C. § 1362, does Title IV of ERISA contravene the Due Process Clause of the Fifth Amendment?

COUNTERSTATEMENT OF THE CASE

The Court of Appeals accurately stated the case, and we accept its statement as our own:

> Pursuant to collective bargaining with the UAW, in 1960 Nachman established a pension plan for certain employees at its Armitage Avenue facility in Chicago. The plan terms provided for vesting of benefits after employees fulfilled specified age and length-of-service requirements. This pension plan is characteristic of "defined-benefit" plans, promising a fixed monthly benefit level for each year of service. As is typical of a defined-benefit plan, Nachman was required to make annual contributions to a trust fund on an actuarial basis. Those contributions were calculated by reference to administrative costs of the fund, benefit liabilities accruing during the current plan year("normal costs"), and the amounts necessary to amortize the past service liability over thirty years. The parties do not dispute that Nachman complied fully with the funding obligations imposed by the plan.
>
> On October 1, 1975, Nachman gave timely notice to the UAW that it was terminating the pension plan effective December 31, 1975. The termination accompanied the closing of the Armitage Avenue facility, which had become unprofitable. The propriety of the termination is not challenged.
>
> It is also undisputed that the assets in the trust fund are insufficient to pay all the vested benefits which accrued before December 31, 1975. Apparently the fund assets can provide only thirty-five percent of the accrued vested benefits. Under the terms of the plan, the employees' benefits would be reduced ratably. Nachman would not be obligated to assume liability for the unfunded benefits. Article V, section 3 of the plan provides:
>
> > Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid.
>
> Nachman brought an action for declaratory relief to determine whether ERISA would impose any liability on it for the vested, but unfunded, benefits. The district court granted summary judgment in Nachman's favor, holding that Congress did not intend until January 1, 1976, to subject employers to liability for unfunded benefits which they had dis-

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[1] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975). The relevant portions are reprinted in the Petition, at 3-5.

> claimed. Since Nachman terminated the pension plan prior to that date it was not found subject to statutory liability. (Pet. App. 2-3, footnote omitted).

The Court of Appeals reversed. It held that because the participants' benefits were unconditionally vested under the terms of the plan they were "nonforfeitable" within the meaning of 29 U.S.C. § 1322 and therefore guaranteed; accordingly it held that Nachman was liable under 29 U.S.C. § 1362. (Pet. App. 7-18) The court held further that as so construed ERISA does not violate the Due Process clause of the Fifth Amendment because it is a rational means to a legitimate end. (Pet. App. 19-29.)

REASONS FOR DENYING THE WRIT

Petitioner asserts that on the constitutional issue which it presents there is a conflict between the decision below and decisions of this Court, and that with respect to the statutory issue which it raises there is a "conflict in rationale" between the decision below and that of another Court of Appeals. However, the decisions of this Court on which Petitioner relies are plainly distinguishable on their facts and applied a constitutional standard which is not apposite here. Moreover, there is neither a conflict of decisions nor the asserted "conflict of rationale" between the Courts of Appeals: the Second Circuit decision on which Petitioner relies involved a wholly distinct statutory issue, and was cited with approval by the Court below in its opinion.

I. There is Not Even a "Conflict of Rationale" Between Circuits

Petitioner contends that its employees had no "nonforfeitable benefits" at the time it terminated the plan, that they therefore were not entitled to any guaranteed benefits from th PBGC under 29 U.S.C. § 1322, and that in turn PBGC could not recover anything from Nachman under 29 U.S.C. § 1362. Its theory is that the benefits were not "nonforfeitable" because the plan permitted recovery of benefits only against the assets of the fund and did not allow recovery against the employer. According to Petitioner, the decision of the Seventh Circuit, rejecting that argument, "directly conflicts with the rationale of the Second Circuit in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406." (Pet. 17) Petitioner's insistence that there is a conflict of "rationale" is a tacit acknowledgement that the Court below has not "rendered a decision in conflict with the decision of another Court of Appeals on the same matter", see Rule 19 of this Court. But even Petitioner's more modest claim of a conflict is unjustified, as an examination of the true "rationale[s]" of the two Court of Appeals decisions readily reveals.

The court observed that three elements are required for benefits to be "nonforfeitable" under § 1002(19)[2]:

> the "claim" to the benefits must "arise from the participant's service," it must be "unconditional" and it must be "legally enforceable against the *Plan*." (Pet. App. 8, court's emphasis.)

It concluded that all three elements were satisfied by the benefit claims in issue:

> The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their

[2] The court rejected PBGC's position that § 1002(19) was not applicable because, *inter alia*, the definitions of § 1002 are in terms applicable only to Title I. PBGC urged that its regulation, 29 C.F.R. § 2605.6(a), 1977, governed; the court recognized that the "benefits in issue are * * * clearly 'nonforfeitable' if the PBGC definition is employed" (Pet. App. 6).

claim against the plan conditional. All conditions placed upon the participant such as age and length of service have been met. (Pet. App. 9, court's emphasis).

The court buttressed its interpretation by reference to a leading authority in the field, and a close examination of the legislative history. (Pet. App. 9-16). That history shows *inter alia* that Congress used the terms "vested" and "nonforfeitable" interchangeably (*id.* pp. 12-14) and that it recognized that a contrary interpretation "to cover only instances in which the employer assumed liability for incompletely funded plans would import so narrow a purpose to Congress as to make the enactment of Title IV almost meaningless." (*Id.* p. 14).

In asserting a conflict of rationale between this decision and *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, Petitioner correctly states that in *Riley* the Second Circuit "found that a benefit that had vested by the time the employee terminated his employment was in fact forfeitable because it was subject to a condition subsequent —the benefit would be forfeited if the employee competed with his former employer" (Pet. 17). As Judge Friendly wrote, the MEBA plan provision "places a condition on Riley's claim to the monthly benefits to which he would otherwise be entitled and makes his claim legally unenforceable *against the Plan*; it thus constitutes a forfeiture within the meaning of ERISA." (570 F.2d at 409, emphasis added.) The Seventh Circuit agreed with this "rationale":

> Some conditions on vested benefits related to requirements imposed on the participants might render the benefits forfeitable, at least until 1976 when Title I would invalidate such conditions. See, *e.g.*, the benefit rights in *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977). In this case, the vesting was unconditional. (Pet. App. 9, n.7.)

Curiously, Petitioner fails to mention the Seventh Circuit's discussion of the opinion which is the basis of the

supposed "conflict". And while Petitioner also points to a District Court decision which reached a different result, that is plainly not sufficient ground for invoking this Court's jurisdiction. Particularly in light of the thorough analysis of Judge Sprecher's opinion for the Court of Appeals in this case, there is no reason to anticipate that the Courts of Appeals will be unable to resolve this statutory issue without need for recourse to this Court.

II. The Constitutional Issue Raised by the Petition is Insubstantial

Following *Usery* v. *Turner Elkhorn Mining*, 428 U.S. 1, (*Turner Elkhorn*)[3] the Court of Appeals determined

[3] In *Turner Elkhorn*, this Court upheld Congressional imposition of liability on coal industry employers to compensate employees suffering from black lung disease with respect to employees who had terminated prior to the effective date of the Black Lung Benefits Act of 1972.

The Court began its analysis by reaffirming that

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. (428 U.S. at 15)

Then turning to the precise issue of the constitutionality of legislation with retrospective effect, the Court said (*id.* at 16-17):

> * * * And it may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. (Citations omitted) This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. (Citations omitted)
>
> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Applying this principle, the Court in *Turner Elkhorn* concluded that "the imposition of liability for the effects of disabilities bred in

that the standard to be applied in adjudicating whether ERISA violates the Due Process clause is whether the legislation represents a rational means to a legitimate end. And the court elaborated the "rationality" standard in the following illuminating passage:

> Application of the factors relevant to judicial assessment of rationality, as distilled from these and other precedents, indicates that Title IV satisfies Due Process. Rationality must be determined by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, *Allied Structural Steel Co.* [v. *Spannaus*,] at 4890-91; *Adams Nursing Home of Williamstown, Inc.* v. *Mathews*, 548 F.2d 1077, 1080-81 (1st Cir. 1977); whether the impairment of the private interest is effected in an area previously subjected to regulatory control, *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891, *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the equities of imposing the legislative burdens, *Alton Railroad*, 295 U.S. at 354; *Turner Elkhorn Mining*, 428 U.S. at 19, and the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. *W. B. Worthen Co.*, 292 U.S. at 434; *Allied Structural Steel Co.*, 46 U.S.L.W. at 4891. It must be emphasized that although these factors might improperly be used to express merely judicial approval or disapproval of the balance struck by Congress, they must only be used to determine whether the legislation represents a rational means to a legitimate end. *See Turner Elkhorn Mining*, 428 U.S. at 18-19. (Pet. App. 23, footnote omitted.)[4]

the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor * * *", 428 U.S. at 18, quoted at Pet. App. 22.

[4] It is clear from the foregoing that Petitioner errs in stating that "the Seventh Circuit mentioned several tests which it believed might apply to the judicial scrutiny of ERISA" (Pet. 14). The test the Court employed below was "means-end rationality", Pet. App. 21, 23. What Petitioner describes as alternative tests (Pet. 14-15) are factors the Court considered in determining whether the legislation is rational.

The Court of Appeals then applied these factors to ERISA, which it also compared to the legislation which had been struck down in the cases on which Nachman bases its Petition, *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1934), (*Alton*), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), (*Allied*). Rather than reiterate all the points of difference which the court below found, we point out the most significant.

First, the Court observed that Congress viewed it "as an abuse of the private pension system in need of correction" that due to plan termination about 20,000 workers a year lost vested pension benefits which they had "'anticipated'" would provide retirement security. Thus, "Congress perceived a widespread problem of national importance", in contrast with the "extremely narrow focus" of the Minnesota statute. See 438 U.S. at 248, distinguishing *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398, 445.

Second, unlike the legislation struck down in the *Alton* and *Allied* cases, Title IV of ERISA imposes liability on employers only with respect to employees whose right to a pension had already vested under a pension plan; it did not award a pension to any person not otherwise eligible. This difference, as the court below recognized (Pet. App. 24-26), is doubly significant. There is a lesser interference with the employer's reliance interest than under the Minnesota Act (compare 438 U.S. at 245-246) and ERISA vindicates substantial countervailing employee expectations which would otherwise be disappointed because the employer has terminated the plan, whereas

"Minnesota did not act to protect any employee reliance interest demonstrated on the record." (*Id.* at 246, n.18).[5]

Lastly, the Court of Appeals attached particular importance to Congress' attempt in ERISA "to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose." (Pet. App. 27). The Court explained (*id.* at 27-28):

> Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding. III LEGISLATIVE HISTORY [of ERISA] at 4741 (remarks of Sen. Williams); II LEGISLATIVE HISTORY at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. REP. No. 93-383, I LEGISLATIVE HISTORY at 1155. It was also believed that to impose liability would cause employers to assume a more responsible funding schedule. II LEGISLATIVE HISTORY at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.
>
> Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U.S.C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U.S.C. § 1322(b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability. Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U.S.C. § 1367.[6]

In sum, the court below was fully justified in concluding that ERISA is rational and therefore constitutional in imposing liability on Nachman and others in its position, and in concluding further that ERISA differs decisively from the legislation struck down in *Alton* and *Allied*.

B. Petitioner nowhere acknowledges its burden of showing that Congress could not rationally require it to bear a limited liability as part of the statutory guaranty scheme to guarantee pension benefits to employees who would otherwise be deprived of their vested right to a pension by termination of the plan. Petitioner does not assert that imposition of liability on it is irrational, much less show that it is so. Thus, petitioner has failed to make even the minimal showing necessary to support a claim that the constitutional issue is sufficiently substantial to merit this Court's attention. Instead, Peti-

[5] Nachman characterizes as "startling" the Court of Appeals' "finding" that "the 'employees' reliance interest in vested benefits outweighs the employer's reliance on prior funding'"; according to Nachman, "the benefits at issue were not promised under the terms of the Plan, but only as the Plan was later affected by ERISA" (Pet. 15). But Nachman is clearly wrong, since the "vested benefits" on which employees relied are precisely and exclusively those which the employees had been "promised under the terms of the plan".

[6] ERISA contains additional protections which the Court did not mention. See pp. 13-14, *infra*.

tioner invokes two constitutional principles which it says are established by the *Alton* and *Allied* cases. But it is clear that both constitutional rules which Petitioner invokes are entirely spurious.

First, Petitioner says that *Alton* and *Allied* "stand for the proposition that the Constitution forbids legislation which imposes a new liability on employers to pay additional compensation to its employees for work which has been fully performed and compensated." (Pet. 13.) Petitioner errs for two reasons: First, those cases did not apply the "rationality" standard which governs here.[7] Second, what the Court meant in those cases by forbidden "additional compensation" was a legislative determination that individuals would be entitled to a pension who had not achieved eligibility under any pension plan. See 295 U.S. at 348-354; 438 U.S. at 246-247. In contrast, Title IV, insofar as it is in issue here, requires only that the employer be subject to liability in connection with benefits that had vested under the plan, but could not be paid from funds in the plan at termination.

Second, Nachman asserts that even if "the imposition of new liability for past service were permissible, due process requires that Nachman be given the opportunity to avoid that liability." (Pet. 14) In deriving this proposition from *Allied,* Petitioner fails once again to appreciate the significance of the fact that *Allied* arose under the Contracts Clause. It is entirely clear that the absence of a grace period was deemed significant by the Court because the case arose under the Contracts Clause. In this connection, the Court said:

[7] The "rationality" standard was again declared to be controlling in passing on economic regulations under the Due Process Clause in a case decided just two days before *Allied, Duke Power Co.* v. *Carolina Env. Study Group,* 438 U.S. at 59, 83, quoting *Turner Elkhorn*; see also *id.* at 88, n.32.

> Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. (438 U.S. at 247.)

And, after its reference to "grace periods" under ERISA (see n.9, *infra*), this Court continued:

> Yet there is no showing in the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem. (*Id.*)[8]

Although the absence of an opportunity to escape legislation which materially affects the parties' bargain was deemed pertinent in Contracts Clause analysis, it does not render legislation irrational. Here, it was entirely sensible for Congress to make termination liability applicable immediately on the enactment of ERISA, because an automatic grace period would have invited the premature termination of thousands of plans, thereby exacerbating the problem in the course of trying to cure it. Rather than to adopt that self-defeating course, Congress provided relief for the truly needy by authorizing the PBGC for nine months after the enactment of ERISA to waive or limit employer liability where "necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan." (29 U.S.C. § 1304(f)(4).[9] Moreover, the deci-

[8] This sentence strongly suggests that the absence of a grace period would not by fatal even under the Contracts Clause if the disruption *is* "necessary to meet an important general social problem."

[9] Nachman seizes on footnote 23 of this Court's opinion (438 U.S. at 249) in *Allied* where the Minnesota Private Pension Benefits Protections Act was contrasted with ERISA, and characterizes it as a "holding" that Congress "allowed phase-in grace periods during which employers could terminate plans without further liability", which the decision below "squarely contradicts" (Pet. 15). A "holding" is just what the referenced footnote is not, because the

sion to terminate is voluntary. Thus, Nachman could have avoided the imposition of lump-sum liability under ERISA while cutting off additional benefit accruals. Such a cut-off, or plan "freeze", is not an insurable event involving PBGC that triggers imposition of liability under 29 U.S.C. § 1362. Nachman could then have continued to fund previously accumulated accruals on the same basis as before.

Nachman contends that the effective date for the new funding and vesting standards for *plans* under Title I should also have been the effective date of liability for *employers* under Title IV in connection with benefits to employees vested under the plan without recourse to the ERISA standards. Petitioner does not state why Congress should have equated the effective dates of these entirely distinct regulations; more to the point, it does not even *assert* that "the legislature has acted in an arbitrary and irrational way" in choosing the course which Petitioner would strike down as a violation of due process, see *Turner Elkhorn*, 428 U.S. at 15.

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meaning of ERISA was not at issue in *Allied.* This doubtless explains why the Court's description of ERISA is not entirely precise in saying that at "the outset ERISA did not go into effect at all until four months after it was enacted, 29 U.S.C. § 1144 (1976 ed.)". The cited section is the anti-preemption provision of ERISA, and the four-month delay in its applicability does not extend to the entire Act. The further statement in the *Allied* footnote, that the funding and vesting requirements were delayed for an additional year, is correct; these requirements are contained in Title I, for which the sections there cited (29 U.S.C. §§ 1086(b) and 1061(b)(2)), provide the effective dates.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

Respectfully submitted,

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